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Supreme Court of the United States

October Term, 1998

MAXINE B. COUSIN, LORENZO E. ERVIN, JR., EZRA B. HARRIS, JOHNNY D. HOLLOWAY, GEORGE A. KEY, SR., BUFORD MCELRATH, ANNIE D. THOMAS, BOBBY WARD, and ELLA BRYANT,

Petitioners,

v.

DON SUNDQUIST, Governor of Tennessee; STATE ELECTION COMMISSION; BROOK THOMPSON, Coordinator of Elections; HAMILTON COUNTY ELECTION COMMISSION; and CAROLYN JACKSON, Superintendent of Elections of Hamilton County,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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ARGUMENT

I. The Court of Appeals' Racial Bloc Voting Analysis Was Flawed

Respondents dispute petitioners' statement that "the court of appeals relied primarily upon the analysis of defendants' expert, Dr. Delbert Taebel," in concluding that racially polarized voting was not legally significant within the meaning of *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986). Brief in Opposition to Petition for Writ of Certiorari, p. 12 (hereinafter Brief in Opposition). To the contrary, the court of appeals said unambiguously that "we find Dr. Taebel's study more relevant" than the study of petitioners' expert Dr. Cole, App. 13, and that "Dr. Taebel's analysis shows that minority-preferred candidates can and do win county-wide elections in Hamilton County." App. 18. It bears repeating that Dr. Taebel's analysis: (1) included only one election involving a black candidate;[1] (2) excluded all primary elections; and, (3) excluded all the black/white judicial elections.

To the extent that the court of appeals *did* consider the black/white elections analyzed by Dr. Cole, it merely compounded the error of its highly selective, white/white election approach. It erroneously inflated the level of white support for black candidates in municipal and state judicial elections, *see* Petition for Writ of Certiorari,

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[1] In their Brief in Opposition, p. 8, respondents say that "[o]nly one election analyzed by the petitioners' expert involved a black and white candidate." This is obviously a typographical error, since there is no dispute that this is a description of the analysis done by respondents' expert.

p. 27,[2] and held that the success of black candidates in majority black state house, city council, and school board districts refuted Dr. Cole's conclusion that white bloc voting was significant. App. 15 ("these examples of black candidates' success . . . show that Dr. Cole's conclusion – that black candidates in Hamilton County will usually lose for lack of sufficient white crossover support – is not borne out even by his own data"). The fact that black candidates have won in majority black districts does not disprove, logically or legally, that blacks will usually lose countywide, where blacks are only 17% of the voting age population. App. 43. These black electoral successes show, rather, that majority black districts have been an effective remedy for minority vote dilution, *see Brown v. Board of Commissioners of Chattanooga, Tenn.*, 722 F.Supp. 380 (E.D.Tenn. 1989) (invalidating at-large elections in Chattanooga on vote dilution grounds), and have provided black voters an equal opportunity to elect candidates of their choice.[3]

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[2] Respondents have not contested these errors of the court of appeals.

[3] Respondents suggest, Brief in Opposition, p. 15 n.7, that the racial bloc voting analysis in this case should be limited to the municipal judicial elections (including the contest in which the black candidate – Timberlake – was ineligible to hold office and was by definition not a serious candidate), and the only countywide position (public defender) ever won by a black. Adopting such a selective approach, aside from being entirely self-serving, and aside from the fact that blacks are a greater percent of the municipal population than the county population (34% versus 19%), would preclude a court from making a determination about how voters "usually" voted within the meaning of Thornburg v. Gingles, 478 U.S. at 51.

II. There Is Substantial Evidence of Recent Discrimination in Hamilton County

Respondents contend that the district court, in its totality of circumstances analysis, made no findings of discrimination beyond the year 1911. Brief in Opposition, p. 9. Their contention is in error.

First, respondents stipulated to ongoing discrimination in Hamilton County in virtually every aspect of life into the 1960s. Trial Exs. 371, paras. 105-80; 372, paras. 105-80. These stipulations, many of which were adopted verbatim by the district court, App. 86-92, included:

*"The Chattanooga city commission in the conduct of its business regularly enforced the laws and customs of racial segregation, *e.g.*, authorizing the establishment of a 'colored' orphanage in 1922." Trial Exs. 371, para. 108; 372, para. 108.

*A 1947 report of the National Urban League "documented the continuing existence of segregation in Chattanooga and the depressed socioeconomic conditions of blacks." Housing for blacks was "substandard." A majority of blacks "were in the lowest income brackets." Many black schools were "housed in places that ought to be condemned." Health care for blacks was "segregated" and "was generally inferior." Blacks were "excluded from membership on city boards and agency staff positions." *Id.*, para. 115.

*A black policeman "was suspended from the force in 1948 for arresting a white man in violation of department policy." *Id.*, para. 116.

*When Shepherd Hills, a Hamilton County subdivision, was developed in 1953, "lots were deeded subject to

covenants forbidding sale or rental 'to any Negro, mulatto, or other person of color . . . [or] to any person of Jewish or Hebrew blood.' " *Id.*, para. 119.

*"Musical events at the city auditorium in Chattanooga were customarily segregated on the basis of race. When a black took a seat in the 'whites only' section during a dance in 1956, a fight broke out." *Id.*, para. 121.

*"In 1957, after the Southern Coach Lines removed the segregated seating signs from its buses following a Supreme Court ruling that the segregation was unlawful, someone placed a dummy on the Walnut Street bridge on which was written 'All NAACP bus riding niggers.' " *Id.*, para. 122.

*"Two dynamite explosions were set off within one week in 1958 at the Phillis Wheatley Branch of the YWCA for Negroes. Hotels, train stations, drinking fountains, and city parks were all racially segregated." *Id.*, paras. 123, 124.

*"Blacks were not employed in administrative positions in Chattanooga city government until 1962." *Id.*, para. 136.

*The City of Chattanooga did not open all city operated facilities to blacks until 1963." *Id.*, para. 137.

*"The University of Chattanooga was operated on a racially segregated basis until 1965." *Id.*, para. 139.

*"Erlanger Hospital did not desegregate its facilities until the government threatened to cut off federal funds in 1966. When the hospital's board agreed to sign a certificate of compliance with the Civil Rights Act of 1964, the president of the board resigned in protest." *Id.*, para. 140.

*"Churches and ministerial alliances in Hamilton County are largely segregated." *Id.*, para. 148.

*Public housing in Chattanooga was "planned," "constructed," and "occupied, on a racially segregated basis." Most of the projects administered by the Chattanooga Housing Authority "remain racially segregated to the present time." *Id.*, para. 158.

*In the 1970s "the City of Chattanooga rezoned a parcel of land in the Hickory Valley Road area from multi-family to single family use at the request of local whites who were opposed to the construction of a federally assisted multi-family housing project on the land." In 1981, the city entered into a consent decree in a federal lawsuit brought by the NAACP "in which the city agreed not to interfere with the development and construction of public housing, and to purchase the Hickory Valley Road property and deed it to the developers for construction of multi-family housing units." *Id.*, paras. 162, 163.

*"[C]ity schools were completely segregated on the basis of race." "The administrative staff of the school system was all white. County teacher associations were segregated." *Id.*, paras. 173, 174.

*"During the desegregation of city schools there were racial incidents and confrontations throughout the late 1960s and early 1970s." *Id.*, para. 177.

*Despite court ordered desegregation "resegregation had occurred . . . [as] the result of a 'more subtle and lingering malaise of fear and bias in the private sector which persisted after curative action had been taken to eliminate the dual system itself.' " *Id.*, para. 178.

*"In 1988, 22 of the 52 schools in the city system were racially identifiable (90% or more of one race)." *Id.*, para. 180.

Plainly, there is no basis for respondents' assertion that there was no finding of discrimination beyond the year 1911.

III. Other Gingles Factors

A. The Extent to Which Blacks Have Been Elected to Office

Respondents contend that the lack of black candidates for county judgeship and the fact that there are relatively few black lawyers in Hamilton County undercut a finding of vote dilution. Brief in Opposition, p. 11. First, given the frequency with which blacks have run for other offices, the fact that no black has run for a county judgeship is strong and direct evidence that the at-large system is discriminatory. *See, e.g., McMillan v. Escambia County*, 748 F.2d 1037, 1045 (11th Cir. 1984) ("the lack of black candidates is a likely result of a racially discriminatory system").

The Court in *Thornburg v. Gingles*, 478 U.S. at 57 n.25, recognized that there would be situations "[w]here a minority group has never been able to sponsor a candidate." That does not mean minority voting strength is not diluted, but only that "courts must rely on other factors that tend to prove unequal access to the electoral process." *Id.*

Second, this is not an employment discrimination case by black lawyers in which an "applicant pool" analysis might be appropriate. The rights at issue are those of minority voters. Third, to permit a defense based on the comparative number of black attorneys would reward the state for its history of discrimination, including its exclusion of blacks from universities and law school. *See Gray*

v. University of Tennessee, 97 F.Supp. 463 (E.D.Tenn. 1951); *Sanders v. Ellington*, 288 F.Supp. 937, 940 (M.D.Tenn. 1968) ("some six years elapsed [after the *Brown* decision in 1954] before racial requirements for admission [to state universities] were formally abolished").

B. Responsiveness

Respondents correctly note that petitioners "make no mention of the responsiveness" of county judges to the needs of minorities. Brief in Opposition, p. 11. That is because proof of unresponsiveness is not a "requisite element" of a plaintiff's case under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. S.Rep. No. 417, 97th Cong., 2d Sess. 29 n.116 (1982). Moreover, as the Senate report makes clear, "defendants' proof of some responsiveness would not negate plaintiff's showing by other, more objective factors" of vote dilution. *Id.*[4]

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[4] While petitioners did not make unresponsiveness an issue, the record contains examples of the judges' lack of responsiveness to the black community. For example, the nine trial judges appoint the county jury commissioners, but the judges have never appointed a black to the commission. Meyer, T. Vol. III, p. 139. During the 1960s, criminal defendants in the county filed motions to dismiss their indictments on the ground that no black had ever been appointed foreperson of the grand jury. After the challenges, the criminal court judges appointed for the first time a black and a woman as forepersons. *Id.*, pp. 137-38. The chancellors appoint a member to the Hamilton County Hospital Authority, but they have never appointed a black. Peoples, T. Vol. III, pp. 118-19.

IV. Linkage Is not Observed in Practice

Respondents contend that petitioners are wrong in claiming that "judges who testified at trial said they routinely served outside the areas in which they were elected." Brief in Opposition, p. 18, n.8. That *is* what the judges said, and there is nothing in the testimony cited by respondents that contradicts it. Respondents point out that one of the judges testified that "the circuit court in Hamilton County cannot hear criminal cases." *Id.* That may well be a correct statement of the *jurisdiction* of the circuit court, but it says nothing whatever about judges elected in Hamilton County hearing cases outside of Hamilton County. Similarly, the fact that there is "some" but "not too much" interchange by judges of the various courts *within* Hamilton County, says nothing about linkage or the practice of judges elected in one county hearing cases in another county.[5]

The judges testified without contradiction that prior to 1990 the state Administrator of the Courts "encouraged" judges to freely exchange," or serve in other circuits. Meyer, T. Vol. III, 139-40. *See also* Peoples, T. Vol. III, 114 ("the Chief Justice designated me" to sit in cases outside Hamilton County). One judge testified that "actually I have a goal, I want to sit in all 95 counties in the state." Meyer, T. Vol. III, 140-41. Exchange is not encouraged as much today, but solely because of concern over

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[5] Respondents' discussion, Brief in Opposition, p. 18 n. 8, of the testimony of Judge Barker, T. Vol. II, 132, is misleading. Here is the exchange that occurred: "Q. Is there any interchange among the judges within the circuit court? A. Some, not too much, but some, yes, sir." *Id.* It is apparent that the judge was not testifying about linkage, but only the frequency with which judges served on the various courts within the county.

the added expense involved. *Id.*, p. 141 ("Q. It doesn't have anything to do with any other consideration – A. No. Q. – Except saving money? A. No. Financial.").

V. Office Holders Have no Right to a System that Maximizes the Advantages of Incumbency

Respondents quote the court of appeals with approval that a system of cumulative voting

> forcing these judges to oppose each other would, to a substantial degree, deny them the full appreciation of the benefits of their incumbency, increasing the possibility that the election would unseat some of the hardest-working and most efficient judges in the state.

Brief in Opposition, p. 23. No court, to petitioners' knowledge, has ever held that office holders have a right or entitlement to a system that guarantees them "the full appreciation of the benefits of their incumbency."[6] Under our democratic system, elected office belongs to the voters, not the incumbents. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("it would be an unusual case in which a court would be justified in not taking appropriate action to

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[6] Far from recognizing a right to office holding, let alone to the "benefits" of incumbency, lower federal courts have routinely required special elections or shortened the terms of officials elected under illegal systems. *See, e.g.*, Wallace v. House, 377 F.Supp. 1192, 1201 (W.D.La. 1974); Taylor v. Monroe County Board of Supervisors, 421 F.2d 1038 (5th Cir. 1970); Watkins v. Mabus, 771 F.Supp. 789 (S.D.Miss. 1991). This Court, of course, has recognized the appropriateness of setting aside elections to cure voting rights violations. NAACP v. Hampton County Election Com'n, 470 U.S. 166, 182-83 (1985); Clark v. Roemer, 500 U.S. 646, 659-60 (1991).

insure that no further elections are conducted under the invalid plan").

In addition, there is no reason to suppose that judges elected under a racially fair system of elections would not be hard working and efficient. To conclude otherwise would be to indulge in crude racial stereotyping.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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